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Large-Scale Dispute Resolution in Jurisdictions Without Judicial Class Actions: Learning From the Irish Experience

S. I. Strong

University of Missouri School of Law, strongsi@missouri.edu

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LARGE-SCALE DISPUTE RESOLUTION IN JURISDICTIONS WITHOUT JUDICIAL CLASS ACTIONS: LEARNING FROM THE IRISH EXPERIENCE

*S.I. Strong**

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I. INTRODUCTION

Recent years have seen an unprecedented expansion of the ability to assert large-scale claims in national judicial systems, either on a collective or representative (class) basis.¹ Numerous countries, including many that excoriated United States-style class actions in the past, have now adopted various forms of collective redress as society's need to respond large-scale claims has increased.² Although every jurisdiction has developed its own unique method of responding to large-scale legal injuries, there appears to be

* D.Phil., University of Oxford; Ph.D. (law), University of Cambridge; J.D., Duke University; Master in Professional Writing, University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York, Illinois and Missouri and as a solicitor in England and Wales, is the Manley O. Hudson Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution. The author would like to thank Turlough O'Donnell SC and Arran Dowling-Hussey for insights into the processes under discussion here. All errors of course remain the author's own.

1. See Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS OF THE AM. ACAD. OF POLITICAL & SOC. SCI. 7, 7–27 (2009).

2. See S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have A New Analogue?*, 88 NOTRE DAME L. REV. 889, 903 (2012).

a growing consensus that contemporary legal systems require some means of responding to widespread harm involving the same or similar facts.

Not every jurisdiction has adopted this view, however. One country—the Republic of Ireland—has resisted the development of large-scale forms of judicial relief, despite several instances where such a mechanism would have been useful.³ The most recent of these disputes, *Gaffney v. DePuy*, involves over 1000 claims relating to defective hip implants.⁴ The dispute is so extensive that the Irish High Court has estimated that the claims will not be fully resolved until 2022 if the dispute remains in the judicial system.⁵ As a result, the court, working with the parties, has approved the use of an extremely innovative alternative dispute resolution mechanism to resolve the claims in a more efficient, just and orderly manner.⁶

As novel as this procedure is, this is not the first time that Ireland has needed to provide redress for widespread legal harm. However, the *DePuy* matter is different in several key regards and provides an intriguing example of how large-scale arbitration can develop in a jurisdiction that does not offer large-scale relief in its national courts. In so doing, Ireland puts to rest the longstanding debate among international scholars and practitioners about whether large-scale arbitration can develop in a legal system that does not provide for judicial forms of class or collective relief.⁷ The Irish example

3. Commentators have noted the existence of a rudimentary system of so-called representative relief in Ireland but have denounced it as unworkable. See Liz Heffernan, *Comparative Common Law Approaches to Multi-Party Litigation: The American Class Action Procedure*, 25 DUBLIN U. L.J. 102, 117–19 (2003) (discussing multi-party litigation in Ireland); see also DAVID MCFADDEN, *THE PRIVATE ENFORCEMENT OF COMPETITION LAW IN IRELAND* 150–56 (2014) (discussing the need for class actions in Ireland).

4. See *Go-Ahead for Alternative Dispute System Over Defective Implants*, IRISH TIMES (Dec. 16, 2015), <http://www.irishtimes.com/news/crime-and-law/courts/high-court/go-ahead-for-alternative-dispute-system-over-defective-implants-1.2468833> [hereinafter *Go-Ahead*]; *High Court Green Lights Resolution System to Settle 1,000 Cases Over Hip Implants*, INDEPENDENT.IE (Dec. 16, 2015), <http://www.independent.ie/irish-news/courts/high-court-green-lights-resolution-system-to-settle-1000-cases-over-hip-implants-34293592.html> [hereinafter *Green Light*]; see also *Gaffney v. DePuy Int'l Ltd.* [2012] No. 13064P (H. Ct.) (Ir.); *Walsh v. DePuy Int'l Ltd.* [2013] No. 6949P (H. Ct.) (Ir.).

5. See Tim Healy, *Dispute Resolution System Aimed at Settling 1,000 Cases Over Allegedly Defective Hip Implants is “Manifestly Unfair”*, *Court Hears*, INDEPENDENT.IE (Nov. 13, 2015), <http://www.independent.ie/irish-news/courts/dispute-resolution-system-aimed-at-settling-1000-cases-over-allegedly-defective-hip-implants-is-manifestly-unfair-court-hears-34198172.html>; see also *Go-Ahead*, *supra* note 4; *Green Light*, *supra* note 4.

6. See *Green Light*, *supra* note 4; Healy, *supra* note 5 (explaining the initial procedural proposal was rejected).

7. See generally, CLASS ARBITRATION IN THE EUROPEAN UNION (Philippe Billiet ed., 2013); DOSSIER: CLASS AND GROUP ACTIONS IN ARBITRATION (Bernard Hanotiau & Eric A. Schwartz eds.,

also provides a new procedural model that can be contrasted to existing forms of class, mass and collective arbitration⁸ and offers various insights into the creation, form and use of mass claims commissions.⁹ As a result, there is much that the United States and international legal communities can learn from the Irish experience.

The discussion begins in Section II with a brief history of large-scale disputes in Ireland. The article then moves in Section III to an analysis of the claims against *DePuy* to determine whether and to what extent the dispute resolution mechanism used in *DePuy* improves upon procedures developed in earlier disputes. The discussion concludes in Section IV by drawing together the various strands of thought and providing some forward-looking proposals for Ireland and other jurisdictions that do not offer large-scale relief in their national judicial systems.

II. LARGE-SCALE CLAIMS IN COUNTRIES WITHOUT LARGE-SCALE RELIEF – THE IRISH EXPERIENCE

According to basic principles of Irish and international law, individuals are entitled to the timely, efficient and just resolution of their legal disputes.¹⁰

forthcoming 2016); S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 22 (2013).

8. Large-scale arbitration is becoming increasingly popular and can take a variety of forms. See STRONG, *supra* note 7, at 38–104 (discussing class arbitration in the United States and Colombia, mass arbitration in the international investment context, and collective arbitration in the United States, Spain and Germany).

9. A number of large-scale compensation schemes have been developed as a matter of national and international law. See Eritrea-Ethiopia Claims Commission, Permanent Court of Arbitration, http://www.pca-cpa.org/showpaged21e.html?pag_id=1151 (last visited Feb. 21, 2016); *Records of the Indian Claims Commission*, NATIONAL ARCHIVES, <https://catalog.archives.gov/id/10460953> (last visited Feb. 21, 2016) (providing decisions of the Indian Claims Commission, and predecessor agency, U.S. Court of Claims, from 1946–1978); *Unpaid Foreign Claims: War Claims*, BUREAU OF THE FISCAL SERVICE, https://www.fiscal.treasury.gov/fs-services/gov/pmt/unpdforclaims/war_claims.htm (last visited Feb. 21, 2016) (discussing the Foreign Claims Settlement Commission and the War Claims Commission under the War Claims Act 1948); UNITED NATIONS COMPENSATION COMMISSION, <http://www.uncc.ch/> (last visited Feb. 21, 2016); Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 831–89 (2011); Mike Steenson & Joseph Michael Saylor, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 528–30 (2009); David H. Williams, *Practicing Before the Arkansas State Claims Commission*, 49 ARK. LAW. 30 (2014); Comment, *The Opinions of the German-American Mixed Claims Commission in the Light of International Law*, 33 YALE L.J. 850, 850 (1942).

10. For example, both the Irish Constitution and the European Convention on Human Rights require timely access to justice. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6.1, Nov. 4, 1950, 213 U.N.T.S. 222 (“In the determination of his civil rights and

This requirement can lead to some difficulties in cases involving mass claims, since the absence of a standing mechanism to deal with such matters could lead to unconstitutional delays.¹¹ However, over the years, Ireland has managed to avoid the problems associated with large-scale legal injuries by creating various ad hoc dispute resolution devices.¹²

There are of course some problems with this approach. For example, the use of highly individualized procedures can lead to due process concerns if parties in one dispute believe that they are being treated unfairly as compared to parties in other sorts of disputes.¹³ However, this system also carries a number of potential benefits. This approach allows the Irish legal system to learn from earlier mistakes and develop better procedures over time. Ad hoc mechanisms also promote procedural flexibility and allow remedies to be tailored to the particular injury at hand.¹⁴ Indeed, the concept of procedural flexibility is often lost in contemporary arbitration, given the

obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”); IRISH CONST. (BUNREACT NA HÉIREANN) arts. 34.1, 40.3.1; European Convention on Human Rights Act 2003 (Act No. 20/2003) (Ir.), <http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/html> (describing status of the European Convention in Ireland); *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11 [37 D.] (H. Ct.) (Ir.) (Hogan, J.) (stating “[t]he judicial duty to ensure the timely administration of justice . . . is derived from Article 34.1 and *Re Haughey*-style basic fairness of procedures (which is in turn derived from Article 40.3.1)”); see also CIVIL LITIGATION 33–36 (Colette Reid ed., 3d ed. 2013) (discussing court proceedings in regards to delays in litigation in the context of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms); Grainne de Burca, *The Domestic Impact of the EU Charter of Fundamental Rights*, 49 IRISH JURIST 49, 50–54, 56–57 (2013) (discussing the national effect of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights in Ireland).

11. For example, the *DePuy* case would not be finally resolved until 2022 if the matter were to remain in court. See *Go-Ahead*, *supra* note 4; *Green Light*, *supra* note 4.

12. This is not to say that victim’s rights groups have not been active in seeking legal redress for their injuries. See, e.g., Carol Ryan, *Irish Church’s Forgotten Victims Take Case to U.N.*, N.Y. TIMES (May 25, 2011), http://www.nytimes.com/2011/05/25/world/europe/25iht-abuse25.html?_r=2 (discussing the group Justice for Magdalenes’ complaint to the United Nations Committee Against Torture regarding injuries associated with the operation of the Magdalen laundries); Sinead O’Carroll, *Symphysiotomy Victims Tell the UN About Cruel and Barbaric Childbirth Operations*, JOURNAL.IE (Mar. 11, 2014), <http://www.thejournal.ie/symphysiotomy-un-1355549-Mar2014/> (discussing the Survivors of Symphysiotomy’s complaint to the United Nations Committee Against Torture regarding certain medical procedures associated with childbirth).

13. See S.I. Strong, *Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures*, 7 WORLD ARB. & MED. REV. 117, 125 (2013).

14. See BILLIET, *supra* note 7 at 24–26.

field's increasing legalism and the similarity of many arbitral rule sets to each other and to judicial processes.¹⁵

Over the years, Ireland has addressed large-scale claims arising in a variety of contexts, including hearing loss in soldiers, abuse of residents in residential institutions, abuse of persons in religiously run institutions (the Magdalen (Magdalene) laundries), assault on women during and after childbirth, and defective construction of dwellings through the use of pyrite.¹⁶ Although these disputes differ from the *DePuy* case in several key regards,¹⁷ many of the procedures have been incorporated into the mechanism that will be used to resolve the disputes in *DePuy* and therefore merit consideration.

A. Army Hearing Loss Claims

One of the first large-scale legal disputes to arise in Ireland involved claims against the state by more than 10,000 soldiers who had suffered hearing loss as a result of the state's failure to provide auditory protection at a time when it was known that repeat firing of guns would lead to hearing loss.¹⁸ Eventually, the cost associated with resolving these claims would be in excess of €321 million.¹⁹

When seeking to resolve the claims, the Irish Department of Health and Children convened an expert group to "examine and make recommendations on an appropriate system and criteria for the assessment of hearing disability arising from hearing loss, with particular reference to noise induced hearing

15. See generally SIMPSON THACHER & BARTLETT, COMPARISON OF INTERNATIONAL ARBITRATION RULES (3d ed., 2008) (charting international arbitration rules and procedures of four different institutions); STRONG, *supra* note 7, at 43 (noting similarities between class arbitration rules and Rule 23 of the Federal Rules of Civil Procedure); Strong, *supra* note 13 at 117.

16. See Joanne Blennerhasset, *Is It Time To get the Multi-Party Started? Exploring the Spectrum of Mass Harm Redress in Ireland*, in ACCESSING JUSTICE: APPRAISING CLASS ACTIONS 347, 347–83 (Jasminka Kalajdzic et al. eds., 2011).

17. A number of these earlier procedures could be framed as compensation schemes rather than arbitration. See Mullenix, *supra* note 9, at 831–89; Steenson & Saylor, *supra* note 9, at 528–30.

18. See Blennerhasset, *supra* note 16, at 355. Although some large-scale claims for social equality had been made earlier, that dispute did not involve questions of private law. See *id.* (discussing Case C-377/89, Cotter and McDermott v. Minister for Social Welfare (No. 1) (1987) E.C.R. 1453 and Cotter and McDermott v. Minister for Social Welfare (No. 2), 1991 1 E.C.R. 1155).

19. See John Drennan, *Army Deafness Saga Finally Nears an End: Over €100m Paid Out in Legal Fees Since First Claims 20 Years Ago*, INDEPENDENT.IE (Jan. 24, 2010), <http://www.independent.ie/irish-news/army-deafness-saga-finally-nears-an-end-26625717.html>.

loss.”²⁰ The report established a tariff system (reflected in what was eventually known as the Green Book) that identified the amount of compensation associated with particular types of hearing loss and injury.²¹ Although the assessment system did not require injured parties to participate in any particular dispute resolution process, the creation of a formal tariff encouraged most parties to settle, since the tariff was to be taken into account in any litigation that ensued.²² Although some concerns were enunciated that the system violated constitutional protections regarding separation of powers, the scheme was, in practical terms, relatively successful.²³

B. Residential Institutions Claims

Several years later, the Irish state faced another set of claims, this time involving approximately 15,000 persons who had been resident in an industrial school, reformatory school, children’s home, special hospital, or a similar institution while minors and who had endured sexual, physical, or

20. THE DEPARTMENT OF HEALTH AND CHILDREN, HEARING DISABILITY ASSESSMENT I, REPORT OF THE EXPERT HEARING GROUP (1998), <http://health.gov.ie/blog/publications/hearing-disability-assessment-report-of-the-expert-hearing-group/> (last visited Feb. 21, 2016).

21. See *id.* at 67–73 (discussing compensation for both tinnitus and hearing loss per se). The tariff was less than what plaintiffs could and did recover in court. See *New Army Deafness Guidelines Will Save State Millions*, RTÉ NEWS (Dec. 7, 1999), <http://www.rte.ie/news/1999/1207/4590-deafness/> (discussing *Hanley v. Minister for Defence* [1999] IESC 86 (Sup. Ct. 1999)).

22. Section 4 of the Civil Liability (Assessment of Hearing Injury) Act stated:

- (1) In all proceedings claiming damages for personal injury arising from hearing loss, the courts shall, in determining the extent of the injuries suffered, have regard to Chapter 7 (Irish Hearing Disability Assessment System) of the Report and, in particular, to the matters set out in paragraph 1 (Summary) and Table 4 (Disability Percentage Age Correction Factor) to paragraph 7 (Age Related Hearing Loss Correction) of that Chapter . . .
- (2) In all proceedings claiming damages for personal injury arising from tinnitus, the courts shall, in determining the extent of the injuries suffered, have regard to the classification method contained in paragraph 9 (Tinnitus) of Chapter 7 (Irish Hearing Disability Assessment System) of the Report.

Civil Liability (Assessment of Hearing Injury) Act § 4(1)(2) (1998).

23. See *Greene v. Minister for Defence*, [1998] I.R. 464, 492; see also David Gwynn Morgan, “Judicial-O-Centric” Separation of Powers on the Wane? 39 IRISH JURIST 142, 150 (2004) (noting concerns that the tariff would be applied by rote). As it turns out, courts took the tariff system into account but did on occasion deviate from the published standards. See, e.g., James Flanagan, *Quantum – Hearing Disability – Personal Injury*, 7 MEDICO-LEGAL J. IRE. 28, 28–31 (2001) (refusing to apply the standards set in the Green Book).

emotional abuse or serious neglect during their time in that institution.²⁴ Although a number of these institutions were overseen by certain religious organizations, the institutions were in some ways functionally similar to prisons, in that many of the residents were young offenders who had been convicted of trivial offenses and sent to the institution as an alternative to serving jail time.²⁵ After a formal inquiry into the actions,²⁶ the state took primary responsibility for the wrongdoing that occurred in the residential institutions, a decision that resulted in a massive financial exposure for the state.²⁷

The state adopted a statutory redress procedure that was based on a system devised by Canada to deal with cases involving aboriginal (First Nations) children who were taken from their families at a young age.²⁸ The mechanism provided for a relatively informal dispute resolution process that was in many ways akin to non-binding arbitration.²⁹ Claims were heard by

24. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, <http://www.rirb.ie/> (last visited Feb. 21, 2016); Peter Garsden, *Will Euros Heal Ireland's Abuse Victims?* 52 EUR. LAW. 62 (2006); *Irish Redress Scheme*, BBC (July 9, 2009), http://news.bbc.co.uk/2/hi/programmes/law_in_action/8139216.stm.

25. See Commission to Inquire Into Child Abuse, Final Report, paras. 2.12–2.13, 3.03 (2005), <http://www.childabusecommission.ie/> (last visited Feb. 21, 2016) (constituting the “Ryan Report,” named after the author, Justice Sean Ryan, and identifying the status of the scheme ten years after it had been put in place); Henry McDonald, “Endemic” Rape and Abuse of Irish Children in Catholic Care, *Inquiry Finds*, GUARDIAN (May 20, 2009), <http://www.theguardian.com/world/2009/may/20/irish-catholic-schools-child-abuse-claims>.

26. A government-issued report outlined the scope of wrongdoing. See Report into the Residential Institutions Redress Scheme (2005), <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/press/090305.pdf> (last visited Feb. 21, 2016); see also Commission to Inquire Into Child Abuse, *supra* note 25.

27. For example, the state’s decision to provide a blanket immunity to religious institutions involved in the residential institutions case was said to have cost €250 million. See Susan Mitchell, *Where Has All the Taxpayers’ Money Gone?* SUNDAY BUS. POST (Dec. 18, 2005), <http://www.businesspost.ie/where-has-all-the-taxpayers-money-gone/>.

28. See Residential Institutions Redress Act 2002; *Irish Redress Scheme*, *supra* note 24. Additional regulations were put into place to supplement the 2002 Act. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, *supra* note 24 (under “About Us”).

29. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, *supra* note 24 (providing complaint forms and discussing the procedure); see also Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, 61 DISP. RESOL. J. 22, 23–24 (May–June 2006) (discussing the use of non-binding arbitration in the United States, including court-mandated non-binding arbitration, as in *In re Federated Dep’t Stores*, 328 F.3d 829 (6th Cir. 2003), which directed creditors in bankruptcy to non-binding arbitration).

the “Residential Assessment Board,” which was said to be “wholly independent,” although it was headed by a former High Court judge.³⁰

The process was relatively straightforward. Parties were told that:

[w]hen the [Residential Assessment] Board receives your application, it will obtain any further information necessary for making its decision in your case. In particular, the Board will wish to be satisfied that it has all the relevant medical evidence relating to your injuries.

The Board is also required by the Act to ask (a) any person named in your application as responsible for abuse which you suffered, and (b) the representative of the institution in which the abuse took place, to provide the Board with evidence appropriate to your application. For this purpose, they will be given a copy of your application and may be given such further information regarding your application as the Board considers appropriate.

When it has obtained all the evidence which it requires, the Board will deal with your application as follows.

Informal settlement

Where the Board is satisfied that you are entitled to redress, it may make an offer in settlement of your application, which you are free to accept or reject. If you accept the settlement offer, no further proceedings are necessary. If you reject the settlement offer, your application will proceed to a hearing by the Board.

Hearing by the Board

If it is not possible to deal with your application by way of a settlement, the Board will allocate a date for the hearing of your application. This hearing, which will be as informal as possible, will be conducted by a panel consisting of two or three members of the Board. The hearing will enable you or the Board to call witnesses to give oral evidence and to question other witnesses.

30. See RESIDENTIAL INSTITUTIONS REDRESS BOARD, *supra* note 24. Although this process does not appear to constitute an improper conflation of arbitration and judicial procedures, Ireland must take care not to conflate the two. See S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. LAW 1027, 1074–75 (2014) (noting issues relating to the appointment of judges as “arbitrators” created problems in a form of “judicial arbitration” proposed by the U.S. state of Delaware, as discussed in *Delaware Coalition for Open Government v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2012), *aff’d*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014)).

Any person named in your application as responsible for the abuse which you suffered, and the representative of the institution in which the abuse took place, may also take part in the hearing.

Hearings will normally be held in Dublin, but arrangements will also be made for hearings in other cities in Ireland. Where an applicant lives outside the State, the Board may make arrangements for the taking of evidence on commission.

All hearings are in private and are not open to the public or to the media. In exceptional circumstances, the Board may at your request allow a close relative or other appropriate person to be present at the hearing of your application.³¹

Once the award was issued by the Board or Review Committee, parties had one month to decide whether to accept the award.³² Parties who accepted the award waived the right to bring a case on the same facts in court.³³ Parties who did not accept the award did not waive their right to litigate their dispute, but they were not allowed to come back to the Board or Review Committee if they received less at trial than in the redress procedures.³⁴

In many ways, the residential institutions case was similar to the army hearing loss case, in that a tariff of damages was again set up pursuant to statute following an expert assessment.³⁵ However, in this instance, the question of causation remained open and subject to resolution through the assessment process. This approach proved highly problematic in light of the difficulty of proving that the mental and other injuries suffered by the plaintiffs were the result of the actions of the residential institution as opposed to other early childhood trauma, such as parental abandonment.³⁶ Furthermore, many participants and observers took the view that allowing robust cross-examination on questions of causation effectively re-victimized the plaintiffs.³⁷

31. RESIDENTIAL INSTITUTIONS REDRESS BOARD, *supra* note 24.

32. *See id.*

33. *See id.*

34. *See id.*

35. *Compare* Civil Liability (Assessment of Hearing Injury) Act 1998, § 4, *with* Residential Institutions Redress Act 2002, §§16-17; *see also* Garsden, *supra* note 24, at 62 (summarizing damages scheme).

36. *See* McDonald, *supra* note 25; *Irish Redress Scheme*, *supra* note 24.

37. *See Irish Redress Scheme*, *supra* note 24.

This is not to say that the residential institutions redress scheme was without benefits. For example, the redress mechanism eliminated certain issues, such as those relating to the statute of limitations (which would have run in most if not all cases), vicarious liability of the state and residential institutions in question (since many of the institutions were run by religious institutions that were not formally incorporated or associated with the state), and prejudicial delay, that would have made recovery in the courts difficult, if not impossible.³⁸

In the end, the state paid out approximately €1.46 billion to resolve the matter, although injured individuals received only minimal compensation.³⁹ Although the scheme had its benefits, many people in Ireland have criticized the procedure, even though outsiders have framed the mechanism as “an overwhelming success.”⁴⁰

C. Magdalen Laundry Claims

The next series of claims was somewhat similar to those involving residential institutions, although the injuries in this case came at the hands of various religious organizations that provided housing and work for unwed mothers and other socially suspect persons in a variety of institutions, most notably the Magdalen laundries, during the 1950s and 1960s.⁴¹ While there has been some debate about the nature and extent of the alleged abuse, the Irish Human Rights Commission found in 2010 that there was sufficient evidence of “unlawful imprisonment, servitude, forced labour and cruel and

38. Under the Irish Constitution, parties can be barred from bringing a claim if the respondent can prove there was inordinate and inexcusable delay in bringing the case. See IRISH CONST. (BUNREACT NA HÉIREANN) arts. 34.1, 40.3.1; *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11 [37] (Hogan, J.); Hilary A. Delany, *Practice and Procedure – Judicial Review Proceedings – Discretionary Factors – Effect of Delay*, 22 DUBLIN U. L.J. 236.

39. See *Compensation for Abuse at Residential Institutions May Hit €1.5 Billion*, NEWSTALK.COM (Feb. 25, 2014) (noting the bill was shared equally between the state and the eighteen religious congregations responsible for the institutions where the abuse took place), <http://www.newstalk.com/Compensation-for-abuse-at-residential-institutions-may-hit-15-billion>; McDonald, *supra* note 25. Although the scheme officially ended some years ago, claims are still occasionally heard under this process. See *O’G v. Residential Institutions Redress Board*, [2015] IESC 41 (2015); *Irish Redress Scheme*, *supra* note 24.

40. See Pamela D. Bridgewater, *Ain’t I a Slave: Slavery, Reproductive Abuse, and Reparations*, 11 UCLA WOMEN’S L.J. 89, 152 (2005).

41. See Cathy Hayes, *Justice for Magdalenes Brings Their Case to the UN*, IRISH CENTRAL (May 21, 2011), <http://www.irishcentral.com/news/justice-for-magdalenes-brings-their-case-to-the-un-122385734-237389201.html>.

degrading treatment” to justify an inquiry into the situation.⁴² Because the state had been complicit in the internment of the women in the institutions, the state again accepted responsibility for the injuries,⁴³ and in 2013, a formal state apology was issued and an \$82 million compensation scheme set in place.⁴⁴

Legislation was enacted setting up a pursuant a tariff scheme for monetary compensation on terms outlined in the state’s official report.⁴⁵ This time, the redress scheme also provided a novel system of in-kind benefits, such as health care and other services, based on provision of a special card.⁴⁶ These benefits were provided as a means of avoiding some of the problems that arose in the residential institutions case when vulnerable and to some

42. *Id.*; see also John Burke, *State Worst Hit by Magdalen’s Unlawful Detention*, SUNDAY BUS. POST (Feb. 10, 2013), <http://www.businesspost.ie/state-worst-hit-by-magdalens-unlawful-detention/>; *Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries* (2013) [hereinafter *Report of the Inter-Departmental Committee*], <http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013> (last visited Feb. 21, 2016); Sue Lloyd Roberts, *Demanding Justice for Women and Children Abused by Irish Nuns*, BBC (Sept. 24, 2014), <http://www.bbc.com/news/magazine-29307705>. For example, debate exists as to whether the acts in question involved “slavery” or “servitude” under various international human rights documents. See David Keane, *Abolitionist in Heart But Not in Action: Slavery, Servitude and the Status of Article 4 ECHR in Irish Law*, 50 IRISH JURIST 166, 186 (2013).

43. Some have referred to “State collusion” in the context of women’s relegation to certain religious-run institutions. See *Report of the Inter-Departmental Committee*, *supra* note 42; Carol Ryan, *Seeking Redress for a Mother’s Life in a Workhouse*, N.Y. TIMES (Feb. 6, 2013), http://www.nytimes.com/2013/02/07/world/europe/seeking-redress-in-ireland-over-magdalene-laundry.html?_r=0 (last visited Feb. 21, 2016). Certainly there was a very close relationship between the Catholic Church and the state during the time in question. See S.I. Strong, *Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society? A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements*, 29 CASE WEST. RES. INT’L J. 1, 21-26, 28-31 (1997) (noting the close constitutional relationship between the Catholic Church and the state and noting the prohibitive religious mores of the time).

44. MR. JUSTICE JOHN QUIRKE, *THE MAGDALEN COMMISSION REPORT* (2013) (Ir.), <http://www.justice.ie/en/JELR/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf/Files/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf>, see also Kayla Hertz, *Today Marks 19 Years Since the Last Magdalene Laundry in Ireland Closed*, IRISH CENTRAL (Oct. 25, 2015), <http://www.irishcentral.com/roots/history/Today-marks-18-years-since-the-last-Magdalene-Laundry-in-Ireland-closed-.html>.

45. See *Redress for Women Resident in Certain Institutions Act 2015* §2 (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/8/enacted/en/print>; see also Quirke, *supra* note 44, at 36–57, 65–78, 83–93.

46. See *Redress for Women Resident in Certain Institutions Act 2015* §2 (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/8/enacted/en/print>; see also QUIRKE, *supra* note 44, at 36–57, 65–78, 83–93.

extent financially unsophisticated parties were given a large lump-sum cash payment.⁴⁷

Those setting up the redress mechanism for the Magdalen laundries case learned other important lessons. For example, unlike the residential institutions case, the Magdalen laundries compensation procedure did not require any proof of causation of individual injury.⁴⁸ Instead, the scheme “exclude[d] mutually antagonistic roles and positions and avoid[ed] invasive and painful inquiry and interrogation” and instead sought to create a “a speedy procedure as part of a final process of healing, reconciliation and closure.”⁴⁹

The Magdalen compensation process included other innovative elements as well. For example, the state decided to adopt and apply “the principles of restorative justice and the methods applicable to and used in alternative dispute resolution” when designing the compensation scheme.⁵⁰ As a result, “the Commission undertook an ‘interest-based dispute resolution process’ which acknowledged the ‘blameless status of the women (‘the Magdalen women[’]) . . . and focused upon their present and future needs, interests and underlying requirements.’”⁵¹

In this setting, “restorative justice” was defined as a process by which “collaboration and consensus replaces positional and adversarial methods” of dispute resolution.⁵² Thus, “[t]he Commission decided to engage in a conversation and enter into a dialogue with the women in order to discover exactly who the Magdalen women now are, how they now are and where they now are,” thereby giving “a voice to each of the Magdalen women who wished to participate in the process.”⁵³ However, the process also needed “to

47. See QUIRKE, *supra* note 44, at 7.

48. See *id.* at 5.

49. *Id.*

50. *Id.* at 2.

51. *Id.*

In order to discover the needs, interests and requirements of the Magdalen women the Commission decided to replace sworn evidence (upon which the assessment of damages in an adversarial based system is based) with informal conversations. Only those women who expressed a wish to converse were contacted. A large majority of the eligible Magdalen women expressed a wish to participate and did so.

52. *Id.* at 25.

53. *Id.*

give careful consideration to the needs and interests of the State and to other persons affected by the proposed Scheme,” since “it would be unjust and unrealistic . . . to ignore the obvious fact that our nation is currently affected by an economic recession of unprecedented proportions which is likely to endure for a protracted period of time.”⁵⁴

When establishing the process, the Commission also met with representatives of the various religious orders that had been responsible for management of Magdalen laundries.⁵⁵ Although many of the members of these religious organizations were of a different generation than those who had run the laundries during the relevant time period, the religious congregations “indicated an interest in meeting with the women who formerly resided with them if the women wished to meet with them” and “expressed a desire to engage in any reconciliation and restorative process which will assist in healing and reducing the hurt experienced by the ladies in the laundries.”⁵⁶

In many ways, the restorative justice aspect of the Magdalen redress scheme is reminiscent of the Northern Ireland peace process, in that the designers of the Magdalen scheme sought not only to understand the interests of the relevant parties (rather than simply their litigation demands) but also to provide a deeper reconciliation than might be possible through monetary compensation alone.⁵⁷ Thus, the Magdalen scheme contemplated mediation between the survivors and the nuns, who felt somewhat traumatized by the claims made against their religious orders.⁵⁸ However, that process never materialized, since many of the survivors of the laundries did not want to be forced to interact with those who had been the cause of their suffering.⁵⁹

At this point, “decisions have been made on 86 per cent of applications out of the 776 received to date with €18 million paid out so far.”⁶⁰ Although the process has been criticized on a number of levels (for example, parties

54. *Id.*

55. *See id.* at 27.

56. *Id.* at 28.

57. *See id.* at 2. This influence may due in part to the fact that Senator Martin McAleese, one of the prominent participants in the Northern Ireland peace process, headed up one of the investigative committees in the Magdalen laundries case. *See* Pamela Duncan, *Will Ireland Apologize to the Women of the Magdalene Laundries?* TIME (July 4, 2011), <http://content.time.com/time/world/article/0,8599,2081008,00.html>.

58. *See* Duncan, *supra* note 57.

59. *See id.*

60. Aoife Carr, *Support Package for Magdalene Women Comes Into Effect Next Month*, IRISH TIMES (June 10, 2015), <http://www.irishtimes.com/news/politics/support-package-for-magdalene-women-comes-into-effect-next-month-1.2244283>.

who accept compensation must waive their rights to litigate the matter further and compensation under the scheme is generally lower than what could be obtained at trial),⁶¹ the mechanism has made it easier for victims to receive compensation, since they do not need to prove liability or causation and can avoid difficulties similar to those seen in the residential institutions case, such as issues relating to statutes of limitations and prejudicial delay.⁶²

D. *Symphysiotomy Claims*

A fourth set of large-scale claims involved women who had been forced to undergo symphysiotomy and pubiotomy surgery, a medically unnecessary and, by all accounts, barbaric procedure imposed on approximately 1500 women during and immediately after childbirth from the 1940s to the 1980s.⁶³ After years of campaigning by victims' rights groups, the Minister for Health and Children eventually commissioned a report into the practice,⁶⁴ and a group redress scheme was finally established in 2014.⁶⁵

The mechanism again involved a public apology on the part of the government as well as an *ex gratia* scheme that established set tariffs for

61. See QUIRKE, *supra* note 44, at 7.

62. See *supra* note 38 and accompanying text.

63. See Kellie Morgan & Nick Thompson, "He Was Sawing Me in Half"—Ireland's Gruesome Era of Symphysiotomy, CNN (Jan. 30, 2015), <http://www.cnn.com/2015/01/30/europe/ireland-symphysiotomy/>; O'Carroll, *supra* note 12 (noting approximately 1500 symphysiotomies were carried out in Ireland); Over 550 claims have been brought thus far. See Paul Cullen, *Symphysiotomy Compensation Refused to 53 Women*, IRISH TIMES (Apr. 14, 2015), <http://www.irishtimes.com/news/health/symphysiotomy-compensation-refused-to-53-women-1.2174497>.

64. See Oonagh Walsh, *Report on Symphysiotomy in Ireland 1944-1984* 103, 107-08 (2014), <http://health.gov.ie/blog/publications/report-on-symphysiotomy-in-ireland-1944-1984-professor-oonagh-walsh/> (last visited Feb. 21, 2016); see also Judge Yvonne Murphy, Independent Review of Issues Relating to Symphysiotomy (2014), [http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/0/F28CD8D766399C3080257D890038F09A/\\$file/Independent%20Review%20Issues%20relating%20to%20Symphysiotomy%20-%20Judge%20Murphy.pdf](http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/0/F28CD8D766399C3080257D890038F09A/$file/Independent%20Review%20Issues%20relating%20to%20Symphysiotomy%20-%20Judge%20Murphy.pdf) (last visited Feb. 21, 2016).

65. See generally THE SURGICAL SYMPHYSIOTOMY EX GRATIA PAYMENT SCHEME (2004), [http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/0/A8B200BE1D7D9A6880257D89003DDABA/\\$file/Terms%20of%20The%20Surgical%20Symphysiotomy%20Payment%20Scheme%20-%2010%20Nov%202014.pdf](http://www.payment-scheme.gov.ie/Symphysiotomy/Symphysiotomy.nsf/0/A8B200BE1D7D9A6880257D89003DDABA/$file/Terms%20of%20The%20Surgical%20Symphysiotomy%20Payment%20Scheme%20-%2010%20Nov%202014.pdf) [hereinafter PAYMENT SCHEME]; Ivana Bacik, *Maternity Care, Midwifery Practice and Women's Choices—Recent Legal Developments*, 21 MEDICO-LEGAL J. IRE. 4, 5 (2015). The scheme does not appear to be the result of an independent statute but is instead subsumed under the auspices of the State Claims Agency. See Press Release, Establishment of an Ex Gratia Scheme for Women Who Underwent the Procedure of Symphysiotomy (July 1, 2014), <http://health.gov.ie/blog/press-release/establishment-of-an-ex-gratia-scheme-for-women-who-underwent-the-procedure-of-symphysiotomy/>.

certain types of injuries without the need to establish causation.⁶⁶ The process, which was administered by retired Judge Maureen Clark, relied largely, if not exclusively, on documents rather than on oral proceedings.⁶⁷

The scheme was entirely voluntary, which meant there was the possibility of future proceedings from women who did not opt into the system (as with other programs, acceptance of compensation under the scheme required a waiver of future litigation against the state).⁶⁸ Although individual claimants might obtain more if they proceeded on an individual basis, they would have had to face a variety of issues, including constitutional concerns regarding prejudicial delay and difficulties in obtaining the necessary medical records.⁶⁹

E. Pyrite Construction Claims

Despite the wide variety of types of injuries in the preceding cases, one feature was common throughout, namely the presence of state liability. However, not all large-scale disputes in Ireland have involved wrongdoing on the part of the state. To the contrary, the most recent large-scale action in Ireland prior to *DePuy* came about as the result of purely private acts.

The injury in this case arose as a result of construction defects relating to involving excess pyrite in crushed stone flooring.⁷⁰ Although it initially appeared as if recovery for these sorts of damages would be entirely private,

66. Proof of the surgical procedure is sufficient for at least some compensation. See PAYMENT SCHEME, *supra* note 65 (reflecting Terms of The Surgical Symphysiotomy Payment Scheme). However, some victims are finding it difficult to meet what they are referring to as an “impossible” level of proof. See Cullen, *supra* note 63.

67. See PAYMENT SCHEME, *supra* note 65 (reflecting Terms of The Surgical Symphysiotomy Payment Scheme).

68. See *id.*

69. See Silvia Martinez Gracia, *Medical Negligence—Standard of Care*, 19 MEDICO-LEGAL J. IRE. 113 (2013) (discussing *Nelson v McQuillan*, Unreported March 8 2013 (H. Ct.)); Silvia Martinez Gracia, *Medical Negligence – Breach of Duty*, 18 MEDICO-LEGAL J. IRE. 100 (discussing *Kearney v. McQuillan* [2010] IESC 20 (SC), which upheld the High Court award on liability and amended the damages award to €325,000); Murphy, *supra* note 64, at 45-48; Mark Tottenham, *Medical Negligence—Symphysiotomy—Inordinate and Inexcusable Delay*, 12 MEDICO-LEGAL J. IRE. 95 (2006) (discussing *Kearney v. McQuillan* [2006] IEHC 186 (H. Ct.)); see also PAYMENT SCHEME, *supra* note 65 (reflecting Terms of The Surgical Symphysiotomy Payment Scheme, which provides for damages ranging from €50,000 to €150,000).

70. See Blennerhassett, *supra* note 16.

various difficulties arose,⁷¹ and the scope of damages led the state to enact a statute that provided for state compensation (the Pyrite Remediation Scheme) relating to remediation efforts.⁷² The scheme, which contemplates an online-only procedure that allows injured parties to recoup certain costs associated with the rehabilitation of the property in question, has at this point received over 700 applications.⁷³ There have been questions whether the mechanism should be extended to cover similar problems involving mica construction blocks.⁷⁴

The Pyrite Remediation Scheme is remarkable for several reasons. First, there is no allegation of state wrongdoing, as was the case with previous large-scale disputes.⁷⁵ Instead, the state only became involved as a result of the private sector's failure to provide adequate compensation and the unconscionability associated with leaving homeowners without any remedy.⁷⁶ While the state is continuing to engage with insurers and other the responsible parties "with a view to agreeing a process within which the latter can contribute resources to the remediation process," it is unclear how what the outcome of those discussions will be and how much the private sector

71. See Fidelma White, *The Meaning of "Merchantable Quality" James Elliot Construction Ltd. v. Irish Asphalt Ltd.*, 47 IRISH JURIST 225, 233 (2012); see also "Pyrite Heave" Case Referred to European Court of Justice, IRISH TIMES (Dec. 2, 2014), <http://www.irishtimes.com/news/crime-and-law/courts/pyrite-heave-case-referred-to-european-court-of-justice-1.2023099> [hereinafter *Pyrite Heave*]. For example, the primary insurer for new home construction, HomeBond, began to run low on funds in 2010. See Michael Brennan, *Devastating "Pyrite Epidemic" Hits 20,000 Newly Built Houses*, INDEPENDENT (Feb. 22, 2010), <http://www.independent.ie/irish-news/devastating-pyrite-epidemic-hits-20000-newly-built-houses-26634603.html>. Questions of liability also exist. See Case C-613/14, *James Elliott Construction – EU standards and contract construction*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=162735&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=295690> [hereinafter Case C-613/14] (last visited Feb. 21, 2016).

72. See Pyrite Resolution Act 2013 (Ir.), <http://www.irishstatutebook.ie/eli/2013/act/51/enacted/en/html>; Pyrite Resolution Board, *Overview of the Pyrite Remediation Scheme Made by the Pyrite Board*, <http://www.pyriteboard.ie/Terms-of-Reference.aspx> (last visited Feb. 21, 2016).

73. Pyrite Resolution Board, *supra* note 72; *Families Who Were Forced Out of Their Homes by Pyrite Move Back In*, JOURNAL.IE (July 20, 2015) (noting over 500 applications have been approved but only 5 houses have been rehabilitated since 2013), <http://www.thejournal.ie/families-homes-move-damage-remediation-scheme-2210767-Jul2015/>.

74. See Dáil Questions: Mica in Donegal–17 September 2014, BREGSFORUM (Sep. 17, 2014), <http://www.bregsforum.com/2014/09/27/dail-questions-mica-in-donegal-17-september-2014/> (Feb. 21, 2016).

75. See Pyrite Resolution Bill 2013: Second Stage (2013), <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2013121600055?opendocument#GGG00500> (last visited Feb. 21, 2016) [hereinafter Second Stage].

76. See *id.*

will be able to pay in the way of damages.⁷⁷ To some extent, the issue relates to financial resources, but there are also a number of legal questions that are waiting to be resolved by the European Court of Justice.⁷⁸ The matter was heard in November 2015, and a decision is expected in due course.⁷⁹

Second, the pyrite program “is not a compensation scheme” per se, and “[h]ome owners will not be able to seek the recoupment of costs associated with the remediation of a dwelling undertaken prior to the commencement of the scheme.”⁸⁰ Instead, the program simply seeks to rehabilitate homes that have been damaged as a result of the use of pyrite during construction.⁸¹

III. THE *DEPUY* PROCEDURE

As the preceding discussion demonstrates, Ireland has a diverse and relatively extensive experience with large-scale disputes, despite the absence of any standard judicial mechanisms providing for class or collective redress. However, the Irish legal system is current facing its biggest test to date, as a result of the *DePuy* dispute. Although the *DePuy* matter is similar in ways to earlier actions, there are also a number of key differences that must be addressed.

A. *DePuy as a Purely Private Dispute*

The first item to note is that the *DePuy* dispute is purely private in nature. While some of the earlier large-scale actions also involved private parties (for example, various religious congregations were involved in matters involving residential institutions and the Magdalen laundries and a number of private entities (such as general contractors, materials producers and insurers) were responsible for the legal injuries at issue in the pyrite dispute), there is nothing to suggest that the state is in any way responsible for the problems at issue in *DePuy* or that the state will need to intervene in the dispute as a matter of public policy, since DePuy, as a large international corporation, appears to have sufficient financial resources to remedy the situation on its own.⁸²

77. *Id.*

78. See Case C-613/14, *supra* note 71 (concerning a question referred to the European Court of Justice by the Irish Supreme Court); *Pyrite Heave*, *supra* note 71.

79. See Case C-613/14, *supra* note 71.

80. Second Stage, *supra* note 75

81. See *id.*

82. For example, DePuy has also been subject to class actions and multidistrict litigation in both the United States and Australia concerning its hip implants, which led to a \$2.5 billion global settlement

These factors suggest that it will not be necessary for the Irish state to undertake some of the measure that it has in the past, such as a formal government investigation into the nature and causes of the victims' injury and the adoption of legislation creating a public redress scheme that is governed or at least strongly influenced by a formal tariff system based on the findings set forth in those government reports. Although some of the earlier dispute resolution mechanisms (for example, the system set up to address army deafness claims) did not include any independent means of resolving individual claims, the use of the tariff system was nevertheless very helpful in guiding settlement discussions between the parties and reducing the number of disputes that made it to court.⁸³ Other schemes provided for a non-binding method of dispute resolution based on the tariffs but allowed parties to opt out of the government scheme if they were unhappy with the result.⁸⁴ However, the perceived reasonableness of the tariff scheme, combined with various practical and legal difficulties that would arise if the case were to go to court, helped encourage parties to accept the decision of the various assessment boards.

Although these tariff schemes have occasionally been criticized, the absence of this sort of formal damages analysis could be somewhat problematic in *DePuy*, since the creation of a government-approved benchmark was very helpful in encouraging settlement. Not only was the process of devising the tariffs reasonably transparent, it was also considered relatively objective and reasonable in how it weighed the various interests.⁸⁵

All is not lost, however. In fact, the participants in the *DePuy* dispute have attempted to recreate this mechanism by adopting an independent evaluation scheme that will provide parties with a reasonable understanding of what the likely quantum of damages are, which is doubtless meant to

for parties in these two countries. See *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation*, 787 F. Supp. 2d 1358 (J.P.M.L. 2011); Joseph Saunders, *DePuy ASR Total Hip Replacement Settlement Update*, SAUNDERS & WALKER PA (June 1, 2014), <http://www.saunderslawyers.com/depuy-asr-total-hip-replacement-settlement-update/>). Furthermore, DePuy has recalled the hip implants in question, which will cap any damages that may arise going forward. See *DePuy ASR & Pinnacle Hip Replacement*, DRUGWATCH (last modified Sept. 4, 2015), <http://www.drugwatch.com/depuy-hip/replacement.php> (describing recall); *Go-Ahead*, *supra* note 4 (noting that DePuy does not admit that the products are defective in every case).

83. See generally Flanagan, *supra* note 23; Greene, *supra* note 23.

84. See Bennett, *supra* note 27, at 29.

85. Thus, when one preliminary report was deemed to be unfair, public outcry led to the creation of a second report. See Roberts, *supra* note 42 (discussing the report initially issued by Senator Martin McAleese alleging no abuse occurred in the Magdalen laundries); see also QUIRKE, *supra* note 44 (contradicting McAleese's report and finding widespread abuse in the Magdalen laundries).

encourage parties to settle the matter without a full hearing.⁸⁶ The process involves a retired High Court judge to oversee the scheme and a team of ten independent evaluators to examine medical reports submitted by the plaintiffs and identify the appropriate settlement offer.⁸⁷

This procedure involves a number of critical elements. First, the independent evaluators are not drawn from or chosen by the law firms representing the plaintiffs, nor are they chosen by the defendant corporation, thereby avoiding the type of “battle of the experts” that is routine in United States litigation.⁸⁸ Although many U.S.-trained lawyers may question the validity of evaluators who have not been appointed by the parties, numerous authorities from the United States and elsewhere have supported the use of court-appointed experts.⁸⁹

Second, evaluators are drawn from the ranks of senior barristers who already demand a high level of respect within the Irish legal system.⁹⁰ As a result, the evaluation mechanism can be expected to generate results that are generally considered to be independent, trustworthy and technically competent with respect to the merits of the claims. Furthermore, the use of an independent team of evaluators suggests that there will not be any discrimination against or differential treatment of particular plaintiffs. Indeed, the fact that claims are being handled in a unified and standardized manner reduces the likelihood that plaintiffs will receive different settlement offers depending on who their lawyer is, when they file suit, etc.

Third, the evaluators in *DePuy* will benefit from certain pre-existing features of the Irish legal system. At this point, assessment of personal injury damages in the Irish legal system is relatively predictable as a result of two factors. First, juries are not available in most civil disputes in Irish courts.⁹¹

86. See *Go-Ahead*, *supra* note 4.

87. See *id.*

88. See Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1565 (1998) (suggesting the primary problem with the battle of the experts is that the competition “is waged before spectators who are for the most part not competent even to understand, much less to apply in a nonarbitrary manner, that intellectual contest’s rules”).

89. See David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIG. 1, 36–45 (2013).

90. See *About Us*, THE BAR OF IRELAND – THE LAW LIBRARY, <https://www.lawlibrary.ie/About-Us.aspx> (last visited Feb. 21, 2016). Most Irish barristers are, like their English counterparts, self-employed, which increases their independence. Furthermore, senior barristers (Senior Counsel, or S.C.s, in Ireland and Queen’s Counsel, or Q.C.’s, in England) are held in high esteem in the legal community and hold a reputation for technical excellence, particularly in their field of specialization.

91. See *Introduction*, COURTS SERVICE (Ir.), <http://www.courts.ie/Courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/Jury%20Service?opendocument&l=en> (last visited Feb. 21, 2016).

Second, Ireland has adopted an extremely innovative administrative mechanism, similar in ways to New Zealand's no-fault tort compensation scheme, that deals with personal injury and wrongful death claims on a preliminary basis.⁹² Together, these two mechanisms reduce uncertainty regarding the settlement value of a personal injury claim and increase the likelihood of an amicable settlement without the need of a full trial. While a certain degree of unpredictability can arise in cases where aggravated damages exist, since such damages are often highly individualized,⁹³ the *DePuy* evaluation system expressly excludes aggravated damages.⁹⁴

B. *DePuy as a Standard Products Liability Case*

Another difference between *DePuy* and many of the earlier large-scale disputes in Ireland is that *DePuy* does not involve highly emotional claims that strike at the very fabric of Irish society.⁹⁵ Instead, *DePuy* constitutes a

92. The Injuries Board is a state-run entity that handles all personal injuries claims unless the parties settle the matter directly between themselves. See About Us, Injuries Board Ireland, http://injuriesboard.ie/eng/About_Us/ (last visited Feb. 21, 2016). Through its administrative process, the Board provides general estimates on amounts recoverable through the "Book of Quantum" and various costs estimators, and eventually issues an award known as an assessment, which the parties may accept or reject. See Frequently Asked Questions, Injuries Board Ireland, <http://injuriesboard.ie/eng/FAQs/> (last visited Feb. 21, 2016). If the parties reject the assessment, they may take the claim to court. Thus, the Injuries Board acts as an initial semi-independent neutral evaluator whose recommendation need not be accepted by the parties. The Irish system is in many ways very similar to New Zealand's no-fault tort regime, although the Irish system does not bar access to the courts, as the New Zealand system does. See *About the Accident Compensation (AC) Act 2001*, ACC (last updated Jan. 24, 2014), <http://www.acc.co.nz/about-acc/legal/legislation/aba00052>; Stephen Todd, *Treatment Injury in New Zealand*, 86 CHI-KENT L. REV. 1169, 1178 (2011). The Injuries Board procedure is also somewhat reminiscent of non-binding arbitration. See Bennett, *supra* note 27, at 23–24.

93. Aggravated damages are permitted in the Irish legal system, although they are considered compensatory in nature. See LAW REFORM COMM'N, REPORT ON AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES para. 5.25 (2000), http://www.lawreform.ie/_fileupload/Reports/rAggravatedDamages.htm (last visited Feb. 21, 2016) (recommending that aggravated damages be defined as "damages to compensate a plaintiff for added hurt, distress or insult caused by the manner in which the defendant committed the wrong giving rise to the plaintiff's claim, or by the defendant's conduct subsequent to the wrong, including the conduct of legal proceedings"). Exemplary damages, however, include a punitive element. See *id.* para. 1.01. Though the Irish approach to aggravated and exemplary damages is somewhat more flexible than that found in England, recovery is still relatively rare. See PAUL WARD, TORT LAW IN IRELAND 234 (2010) (noting exemplary damages in Ireland include a punitive element).

94. See *Go-Ahead*, *supra* note 4.

95. The residential institutions and Magdalen laundry cases were particularly traumatizing for both the litigants and Irish society as a whole.

routine products liability case that is remarkable only for the number of injured parties.

This aspect of the *DePuy* dispute suggests that the claims evaluation process can remain largely if not wholly confidential, as is typical of private forms of dispute resolution. In this, the *DePuy* process will differ from other large-scale matters in Ireland, since many of those cases featured a number of highly publicized elements. For example, many of the previous proceedings involved formal government investigations into the nature and extent of claims. Furthermore, recommendations for damages awards (tariffs) were published and extensively reviewed in the media.⁹⁶ However, some aspects of those earlier processes, most notably the outcome of individual claims, were kept confidential unless and until a party decided to take a dispute to court.

At this point, it does not appear likely that the *DePuy* process will result in the widespread publication of a general tariff of damages, particularly since the defendant has not admitted that the products are defective in every case.⁹⁷ However, this feature does not appear problematic, since there seems to be only a limited public interest in both the process and the individual outcomes associated with the *DePuy* dispute. Not only are no public monies being expended with respect to either the process or the outcome, but the public has already been made aware of the existence of the dispute through media reports and DePuy's recall of the hip implants. Furthermore, Ireland has never required full disclosure of the individual underlying facts in earlier large-scale disputes, so the absence of that element in *DePuy* is not unduly concerning.⁹⁸

96. See generally *Man Settles Action Over Allegedly Defective Hip Replacement*, IRISH TIMES (Jul. 15, 2015), <http://www.irishtimes.com/news/crime-and-law/courts/high-court/man-settles-action-over-allegedly-defective-hip-replacement-1.2286145> [hereinafter *Man Settles Action*].

97. See *Go-Ahead*, *supra* note 4. This is not to say that the matter will remain shielded entirely from view. For example, some public notice of developments could arise if the court retains any sort of general supervisory jurisdiction over the dispute. Although Irish courts typically do not retain supervisory jurisdiction over a matter, there have been instances where supervisory jurisdiction over certain administrative law matters. See Hilary Delany, *Significant Themes in Judicial Review of Administrative Actions*, 230 DUBLIN U. L. J. 73 (1998) (noting "the courts' supervisory jurisdiction in judicial review proceedings is not to vindicate rights as such, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality"). However, given that the *DePuy* matter will be administered privately, the need and ability to retain supervisory jurisdiction may not exist.

98. For example, the Catholic Church successfully resisted producing all of the records relating to residential institutions. See McDonald, *supra* note 25.

C. Additional Logistical Elements

Experience in Ireland has shown that resolution of large-scale disputes can be a time-consuming process, despite the parties' best efforts.⁹⁹ However, *DePuy* attempts to overcome that history through of an entire team of evaluators and a documents-only procedure. Thus, "[a] decision on claims will be made within six weeks of receipt of all documentation," and every six months, "the manager of the scheme will have to report to the chairperson on progress achieved including the number of cases dealt with and whether they have been rejected, accepted or processed."¹⁰⁰ As a result, the alternative procedure should be much faster than individual bilateral litigation in the Irish courts, which would have continued to at least 2022.¹⁰¹

The move toward efficiency has not been without costs. For example, *DePuy*'s documents-only approach is somewhat unusual for Ireland, since Irish courts allow for oral hearings in virtually all cases.¹⁰² However, this approach is similar to the documents-only procedure used in a number of other large-scale disputes and to Ireland's preliminary mechanism for dealing with personal injury and wrongful death claims.¹⁰³ Furthermore, the voluntary nature of the *DePuy* scheme allows those who want an oral hearing or other more personalized assessments (such as those relating to aggravated damages) to opt out of the scheme and bring their claims in court.¹⁰⁴

Some questions arise as to how successful the proposed mechanism will be. For example, the claims at issue here are recent enough that it is unlikely parties will run into some of the litigation problems that other mass claimants suffered, such as those relating to the possibility of prejudicial delay in bringing suit.¹⁰⁵ This phenomenon could lead to a higher number of opt-outs than was seen in other large-scale disputes. However, plaintiffs who proceed

99. Indeed, some matters can be closed prematurely. Thus, the symphysiotomy redress scheme had to be reopened to allow for additional claims. See *Extension for Victims to Claim Symphysiotomy Payment Scheme*, IRISH WORLD (Dec. 10, 2014), <http://www.theirishworld.com/extension-for-victims-to-claim-symphysiotomy-payment-scheme/> (last visited Feb. 21, 2016).

100. *Go-Ahead*, *supra* note 4.

101. See *id.*; Healy, *supra* note 5; *Green Light*, *supra* note 4.

102. See *Right to Oral Hearing has Become Growth Area in Judicial Review Cases*, IRISH TIMES (Oct. 07, 2013), <http://www.irishtimes.com/news/crime-and-law/right-to-oral-hearing-has-become-growth-area-in-judicial-review-cases-1.1552800>.

103. See *supra* note 92 (discussing the Injuries Board).

104. See *Go-Ahead*, *supra* note 4.

105. Parties were put on notice of the alleged defect in 2010, when DePuy issued a worldwide recall for these particular hip implants. See *Man Settles Action*, *supra* note 96.

to court will need to prove causation, which was a significant problem in the residential institutions case.¹⁰⁶ This feature could drive litigants back to the assessment process, as could the fact that many plaintiffs are relatively elderly and may prefer quick resolution to the matter.

IV. CONCLUSION

As the preceding suggests, there is much that can be learned from the Irish experience with large-scale legal disputes. Indeed, Ireland provides answers to a number of questions that have plagued the legal community for some time.

First and foremost, Ireland demonstrates that a country does not need to have a judicial form of class or collective redress to create an indigenous form of large-scale arbitral relief.¹⁰⁷ Instead, the *DePuy* procedure was based on the Rules of the Superior Courts, which permit judges to “invite” parties to use an alternative dispute resolution process, supplemented by the inherent jurisdiction of the court to issue directions.¹⁰⁸ This phenomenon suggests that innovative results can be obtained even in a relatively unsophisticated legal environment, if the parties are willing to work together. Although further analysis of the *DePuy* evaluation scheme will be needed before the mechanism can be placed into the taxonomy of large-scale arbitral mechanisms, Ireland’s contribution to the world of class, mass and collective arbitration is intriguing.¹⁰⁹

Second, the *DePuy* dispute demonstrates that arbitration can be used to resolve mass torts, something that has been questioned in the past.¹¹⁰

106. See *supra* note 38 and accompanying text. DePuy has not admitted that its products were defective in all cases. See *Go-Ahead*, *supra* note 4.

107. See *supra* note 7 and accompanying text.

108. See Rules of the Superior Courts Order 56A: Mediation and Conciliation Rule 2(A)(1) (SI 502/2010) (Ir.), <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/279c5df5030a5e5f802577ca003d47d1?OpenDocument>. Although this rule speaks of mediation, conciliation or other court-approved mechanism other than arbitration, the actual process used in *DePuy* reflects a number of elements similar to non-binding arbitration. See Bennett, *supra* note 29, at 23–24. The Rules’ restriction on arbitration could therefore be interpreted as being limited to binding arbitration.

109. As a preliminary matter, the mechanism seems to be collective in nature, since participants must individually agree to participate in the process. See STRONG, *supra* note 7, at 17, 84–85 (defining collection arbitration as involving individual consent on a pre-dispute or post-dispute basis). However, full analysis of the *DePuy* scheme was not possible at the time of writing, since many of the details of the mechanism were not available.

110. See *id.* at 24; S.I. Strong, *Mass Torts and Arbitration: Lessons From Abaclat v. Argentine Republic*, in UNCERTAIN CAUSATION IN TORT LAW 250, 250–332 (Miquel Martin-Casals & Diego M.

However, such proceedings will develop only to the extent such measures are necessary in the relevant legal environment. Interestingly, the Irish experience demonstrates that the absence of a judicial means of resolving large-scale legal claims does not mean that such disputes do not arise in that particular society; instead, it means that the legal system will have to go to extraordinary lengths to deal with those sorts of matters. As *DePuy* demonstrates, the absence of large-scale judicial relief drove the parties to arbitration not only as a matter of efficiency and party autonomy (the standard justifications for arbitration) but also as a matter of justice, a rationale that has been raised in the context of mass arbitrations in the investment context.¹¹¹ As a result, arbitration is elevated from a secondary or “alternative” form of dispute resolution to an integral and necessary part of a formal system of justice.

Third, the Irish experience suggests that large-scale disputes are more easily resolved when both the process and the outcome are based on principled predictability. This proposition is illustrated by the successful adoption of government-approved tariffs in early Irish disputes and by the use of independent evaluators in *DePuy*. In each of these situations, the presence of objective data regarding the value of the claims encourages settlement of disputes in a rational and timely manner. Furthermore, the benefit of standardized benchmarks is useful regardless of whether the claims are adjudicated by a court, an assessment board or an arbitral tribunal. Indeed, many of the army hearing loss cases settled despite the absence of a formal adjudicative element.

As useful as this information is, questions arise as to whether the Irish model, particularly in the private law context, can be adopted in other jurisdictions. For example, the driving feature in the *DePuy* case appears to be the use of senior barristers as independent evaluators. Unfortunately, some jurisdictions, most notably the United States, do not have a similarly independent and well-respected body of legal experts.¹¹² As a result, it may be that the *DePuy* mechanism would be best suited to countries with a split bar or to disputes that are highly technical in nature.¹¹³

Papayannis eds., 2015) (discussing whether and to what extent arbitration can be used to resolve mass torts as a matter of national and international law).

111. Similar rationales have been seen in cases involving international investment arbitration. See STRONG, *supra* note 7, at 278 (citing the preliminary award on jurisdiction in *Abaclat v. Argentine Republic* as indicating “the rejection of the admissibility of the present claims may equal a denial of justice”).

112. See generally CATHERINE ELLIOTT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 193-200 (14th ed. 2013).

113. Highly technical disputes might be amenable to resolution by non-legal experts in that field.

Finally, Ireland's experiment with restorative justice is extremely intriguing, even if it is unclear whether and to what extent Ireland will continue to move in this direction. On the one hand, the private nature of the *DePuy* and pyrite disputes suggests that Irish large-scale claims may be evolving in a way that will limit the need for restorative justice.¹¹⁴ However, only three years have passed since restorative justice was attempted in the Magdalen laundries case, which suggests that there is time for Ireland and for other jurisdictions to adopt this approach. Hopefully the lessons of the Magdalen laundries dispute are not lost, since Ireland has identified some truly novel ways of bringing restorative and therapeutic justice into the world of tort litigation.¹¹⁵ Indeed, other countries who are seeking to find ways of resolving certain types of emotionally sensitive mass claims (such as those involving widespread racial or sexual abuse) might do well to look at Irish models of restorative justice in the tort law setting.¹¹⁶

These efforts might be assisted in Ireland itself by the enactment of the proposed new law on mediation.¹¹⁷ While it remains unclear whether and to what extent this legislation would extend to large-scale disputes, statutory support for consensual dispute resolution, when combined with an Irish ethos of reconciliation informed by the success of the Northern Irish peace process, may provide for a more productive means of resolving large-scale disputes than has been seen in countries such as the United States.¹¹⁸

As the preceding suggests, Ireland's efforts in the area of large-scale dispute resolution are truly noteworthy. Furthermore, there is much that members of both the United States and international legal community can learn from Irish innovations in this field. It is hoped that this article provides some guidance in that regard.

114. Commentators have suggested that restorative justice does not blend well with standard interpretations of tort law. See Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 UTAH L. REV. 439, 459 (2003) ("If damage calculation methodologies from tort law find their way into the law of restorative justice, victim satisfaction might go down.").

115. Though the field is young, it is intriguing. See Edie Greene, "Can We Talk?" *Therapeutic Jurisprudence, Restorative Justice, and Tort Litigation*, in CIVIL JURIES AND CIVIL JUSTICE 233, 246–52 (B.H. Bornstein et al. eds., 2008).

116. See Diana L. Grimes, Note, *Practice What You Preach: How Restorative Justice Could Solve the Judicial Problems In Clergy Sexual Abuse Cases*, 63 WASH. & LEE L. REV. 1693, 1706 (2006).

117. See A&L Goodbody, *Mediation Bill to be Published Later This Year*, LEXOLOGY, <http://www.lexology.com/library/detail.aspx?g=a4504518-a151-4c09-8f6a-6759f27b8380> (last visited Feb. 21, 2016) (suggesting the proposed bill is expected to be enacted into law in 2016); Dan Buckley, *Mediation Option for Legal Disputes*, IRISH EXAMINER (July 7, 2015) (discussing the content of the proposed bill), <http://www.irishexaminer.com/ireland/mediation-option-for-legal-disputes-341074.html>.

118. See Duncan, *supra* note 57 (regarding role of Martin McAleese in the Magdalen laundries case).

